IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.R.UDAYABHANU

TUESDAY, THE 6TH NOVEMBER 2007 / 15TH KARTHIKA 1929

CRL.A.No. 1863 of 2003()

SC. 48/2002 OF ADDL. DISTRICT & SESSIONS COURT, KOTTAYAM.
CRIME NO.901/2000 OF CHANGANACHERRY POLICE STATION)

APPELLANT: ACCUSED 1, 2, 3, 4 AND 6.
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1. **NAJEEB @ BABU, S/O.KASIM, PUTHUPPARAMBIL HOUSE, THRIKKODITHANAM KARA, THRIKKODITHANAM VILLAGE.**

2. **SINAJ, S/O.MAJEED, PUTHUPARAMBIL HOUSE, THRIKKODITHANAM KARA, THRIKKODITHANAM VILLAGE.**

3. **BIJU, S/O.KASSIM, H.NO.16, RAILWAY PURAMBOKE, PERUNNA EAST KARA, CHANGANACHERRY KARA.**

4. **DILEEP, S/O.BASHEER, KANUPARAMBIL HOUSE, THRIKKODITHANAM KARA, THRIKKODITHANAM VILLAGE.**

5. **DEVASSIA @ SOJI, S/O.VARGHESE, PUTHENPURAKAL HOUSE, CHAMPAKARA KARA, KARUKACHAL VILLAGE.**

BY ADV. SRI.MATHAI VARKEY MUTHIRENTHY

RESPONDENTS:

STATE OF KERALA REP. BY THE CIRCLE INSPECTOR OF POLICE, CHANGANACHERRY THROUGH THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.C.K.SURESH

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 26/10/2007, THE COURT ON 06/11/2007 DELIVERED THE FOLLOWING:

K.R. UDAYABHANU, J.

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CRL.A.NO. 1863 OF 2003

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DATED THIS THE 6TH DAY OF NOVEMBER 2007

JUDGMENT

The appellants are accused 1to 4 and 6 in S.C.No.48/2002 in the file of the Additional District & Sessions Judge Fast Track Court (Adhoc)-II, Kottayam who were tried for the offences under Section 395 I.P.C. Accused No.5 was absconding from the very beginning and could not be apprehended. The appellants stand convicted and sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.3,000/- each and in default to undergo simple imprisonment for three months each.

2. The prosecution case is that while Pws.1 and 2, the brothers were travelling on the motor cycle with registration No. KL-5F/4220 driven by PW2, with PW1 on the pillion through Changanacherry-Kaviyooor road returning after closing their shop carrying cash and valuables were stopped by accused No.6 in the road on the western side of Fathimapuram junction at Perunna Kizhakkukara at 7.45 p.m. on 16-12-2000 and all the accused dragged Pws.1 and 2 with the motor cycle over to a nearby lane and one of the accused cut with a

knife the strap of the bag carried on the shoulder of PW1 in which there was a cash of Rs.1,67,500/-, 11 gold coins weighing 40 grams and nokia mobile phone, a bunch of keys, a letter received from the L.I.C., cheque book of Punjab National Bank, cover containing the photos and its negatives, and a jewel box. It is also alleged that when PW2 resisted, he sustained an injury on the right forearm. Accused No.6 also snatched the gold chain from the neck of PW2. Altogether the value of the articles removed including cash is noted as Rs.2,04,300/-.

3. The prosecution evidence consisted of the testimony of Pws.1 to 10, Exts.P1 to P9 and Mos.1 to 21. Of the prosecution witnesses examined, Pws.1 and 2 are the brothers who were robbed . PW1 is a person who rendered the F.I.S. PW3 is a scene mahazar witness who turned hostile. Pws.4 and 5 are the witnesses to Section 27 recovery of Mos.1 and 2, pieces of gold chain as shown to by 6th accused. Both of them did not support the prosecution and were treated as hostile. PW6 is an independent witness to the arrest of A1 and A5 and recovery of Mos.1 to 21. He has supported the prosecution version. PW8 who is the Head constable attached to Fort Police station arrested A1 to A5 from Thiruvananthapuram. PW10 is the Additional Sub Inspector of police at Changanacherry who effected

recovery of pieces of gold chain as shown by A6. PW9 is the Circle Inspector of Police, who conducted the investigation. Mos.1 and 2 pieces of gold chain were allegedly recovered as per Section 27 statement of 6th accused after his arrest that took place on 13-1-2001 at 5 a.m. He was arrested by PW10,the A.S.I. As already noted above, the date of the incident is 16-12-2000 at 7.45 p.m. Pw10, the Additional Sub Inspector has testified as to the recovery effected from under a stone near the mud wall of the house of his uncle, i.e. door No. 8/50 of Madappalli Panchayat. Ext.P3(a) is the portion of statement wherein he has stated that the above Mos.1 and 2 are concealed by him under the stone at the place. Of course as noted above, Pws.4 and 5, the independent recovery witnesses turned hostile. The evidence of PW10, the Additional Sub Inspector contained no infirmity as such to disbelieve him.

4. As noted above, A1 to A5 were arrested in the same intervening night of 16/17-12-2000 from in front of the temple at Pazhavangadi in Thiruvananthapuram and the bag containing Mos. other than Mos.1 and 2 and cash were recovered from the accused. The arrest was effected at 3.45 a.m. on 17-12-2000. PW6 is the independent witness who have supported the prosecution as to the arrest of A1 to A5 and recovery. PW8 is the Head constable who was

in the patrol party headed by CW14, the Sub Inspector of Police at Fort police station, Thiruvananthapuram. CW14 could not be examined as he was working on a foreign assignment with National police, Kosova. PW8, the Head Constable has testified as to the signature of CW14 in the document. It is the version of PW8 that on seeing the police party, A1 to A5 tried to retreat and the police arrested them and recovered the Mos. PW6 is the person residing adjacent to the place of arrest and he is engaged in coconut vending in front of the temple. The evidence of Pws.7 and 8 as to the arrest of recovery contains no noticeable contradictions. The above articles were identified by Pws.1 and 2 and Pws.6 and 8. It is the version of Pws.6 and 8 that the cash and the rest of the Mos.except MO.21 mobile phone and MO.18 jewel box was found in the bag held by A1. It is the version of PW8 that Rs.16,500/- was recovered from the bag and a sum of Rs.1430/- recovered from the shirt packet of A4. Of course as pointed out by counsel for the appellants, there is discrepancy with respect to the recovery of the jewel box. PW2 has stated that the jewel box was recovered from the pants pocket of A3 whereas PW8 has stated that the same was recovered from the pants pocket of A2. With respect to the rest of the recoveries the evidence of Pws.6 and 8 tallies. I find that the above discrepancy is no reason to discard the

testimony of Pws.6 and 8 as such. It is on the basis of the recovery of Mos.1 and 2, pieces of gold chain effected as per the confession of A6 and the identity of A6 as spoken to by Pws.1 and 2 and the arrest of and recovery from A1 to A5 as testified to by Pws, 6 and 8 that the Sessions Judge convicted the accused. It is the contention of the counsel for the appellant that the prosecution case is altogether to be rejected in view of the fact that Pws.1 and 2, the alleged victims were treated as hostile by the prosecution. It is pointed out that the prosecution version has undergone a total change as Pws.1 and 2 have swerved from the version in the F.I.S. and in their previous statement to the police that A6 stopped the motor cycle in the road and all the accused dragged them along with motor cycle to a lane on the side of the road and then committed robbery and that they can identify all the accused . But Pws.1 and 2 has stated that only A6 dragged them along with motor cycle to a lane nearby the road and that the rest of the accused was standing in the lane and then the robbery etc. was committed. Pws.1 and 2 could identify only A6. He has stated that he was not in a position to identify A1 to A4. It is also alleged that the action of the court below in permitting Pws.1 and 2 to be recalled and facilitating the prosecutor to declare them hostile has resulted in causing prejudice to the accused. Of course, it appears to

me that the court below ought not to have permitted the above action on the part of the prosecutor but the same is no reason to reject the prosecution evidence altogether.

5. It was also contended that in the absence of an identification parade, the identification by Pws.1 and 2 of A6 ought not to have been relied. Counsel has relied on the decision in **Hari Nath v. State of U.P., AIR 1988 S.C.345**. As pointed out that A6 was not known to PW2 prior to the incident and the incident has taken place in the night and hence an identification parade ought to have been held. I find that it is the version of Pws.1 and 2 that there was street light at the place and they could identify A6. I find that the identity of A6 is not confined to the identification by Pws.1 and 2. Section 27 recovery of Mos.1 and 2 is a clinching piece of evidence against A6. The evidence of Pw10, the officer, who conducted recovery is not vitiated by any infirmities. Hence, I find that the involvement of A6 stands established from the version of Pw10 and Ext.P3(a) statement of A6 which is admissible. Of course, PWs.1 and 2 were treated as hostile as their version is not in tune with the prosecution version as to the incident and the version that contained in the F.I.S. that it was all the accused who dragged Pws.1 and 2 and the motor cycle to a nearby lane . But I find that on account of the fact that Pws.1 and 2 were

treated as hostile because of their above version, the prosecution version is not to be rejected as a whole as the rest of the evidence do establish the prosecution version.

6. Accused 1 to 4 along with A5 were arrested in the same night at 3.45 a.m. from Thiruvananthapuram with the rest of the Mos. The version of Pws.6 and 8 in this regard, I find, is trustworthy as no material contradictions were brought out in the version of the above witnesses. The articles recovered were identified by PWs.1 and 2 as well as Pws.6 and 8. As noted by the court below, the arrest and recovery is within eight hours of the incident and that from a pretty distant place. Hence, the court below has found that the time gap is too short so that the articles would have been changed hands and it was in the above circumstances that the Sessions Judge rejected the contention of counsel for accused 1 to 4 that at best they could be indicted only for the offence for having received the stolen properties. The court below has rightly relied on the decision in **Shivappa v. State of Mysore, AIR 1971 S.C.196**. In the above cited decision the recovery was within two days but in the instant case it is within hours and evidently the presumption as envisaged under Section 114 (a) of the Evidence Act would be applicable as noted by the Sessions Judge. I find that the evidence is counterveiling and clinching against

the accused and there is no reason to deviate from the findings of the court below as to the guilt of the accused. The conviction is confirmed.

So far as the sentence is concerned, counsel has pleaded for leniency pointing out that seven years have elapsed since the commencement of the criminal proceedings and so far the accused was living under the shadow of impending imprisonment and that the sole means of livelihood of their families are only their income and that they were rather young on the date of the incident. In the circumstances, the sentence is modified to rigorous imprisonment for eight months and to pay a fine of Rs.3,000/- each as imposed by the court below and in default to undergo simple imprisonment for one month each. They will also be entitled to set off. The Crl. appeal is disposed of accordingly.

K.R.UDAYABHANU, JUDGE

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K.R.UDAYABHANU, J

CRL.A. NO. 1863 OF 2003

JUDGMENT

6-11-2007

K.R. UDAYABHANU, J.

CRL.A.NO. OF

DATED THIS THE th June 2007

ORDER

K.R.UDAYABHANU, JUDGE

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